Karong ak Libau (F) & Ors v BBC Estate V Sdn Bhd & Ors

HIGH COURT (BINTULU) — SUIT NO BTU-21NCvC-2/3 OF 2016 (HC)
LEE HENG CHEONG J
13 FEBRUARY 2017

Civil Procedure — Limitation — Sarawak Limitation Ordinance — Infringement of right to land by alienation — Determining when cause of action accruing — Whether claim statute barred — Sarawak Limitation Ordinance s 3, Item 97 of the Schedule

Civil Procedure — Res judicata — Issue estoppel — Attempt to relitigate matters decided in earlier suit by modifying capacity of parties — Whether plaintiffs not allowed to relitigate matters already adjudicated in earlier suits — Ambit of doctrine of res judicata — Whether confined issues actually decided — Whether also covers issues which could have been raised in earlier suits — Whether suit to be set aside for res judicata — Whether amounting to abuse of process of court

Land Law — Indefeasibility of title and interests — Sarawak Land Code ('SLC') — Whether title of registered proprietor indefeasible free of any alleged native customary rights — General rule on indefeasibility under s 131 of the SLC — Whether exceptions in s 132 of the SLC applicable — Sarawak Land Code (Cap 81) ss 131 & 132

Legal Profession — Solicitors — Restraint — Whether solicitors to be restricted from representing in any further action in the future — Whether credible evidence to show that solicitors deliberately instigating claims — Whether solicitors should be subject to restraint

The first and the second defendants were respectively the registered proprietors of two parcels of land described as Lots 20 and 21. BBC Estate VII Sdn Bhd was the registered proprietor of a parcel of land described as Lot 22. All the said Lots 20, 21 and 22 were mixed zone lands. The first and second defendants were bona fide purchaser for valuable consideration of Lots 20 and 21. The plaintiffs claimed areas under Lot 20 and Lot 21. These were the same areas overlapping with the areas which were previously claimed by other claimants in representative actions in Bintulu Suit No 22–2 of 2005 of which the judgment was delivered by the High Court at Bintulu on 4 April 2011. The areas comprised in Lots 20 and 21 claimed by the plaintiffs were also entirely within the area and of the same subject matter in the High Court Kuching Suit

No 22–93 of 2001-III-I, of which judgment was delivered on 21 January 2010. The area claimed by the plaintiffs were also entirely within the area and of the same subject claimed in High Court Bintulu Suit No 22–22 of 2005 which action was struck out on 18 December 2006. The plaintiffs had been ordered by the High Court in Originating Summons No 24–67 of 2005 to be evicted and vacated forthwith and restrained by an injunction from occupying or entering and re-entering upon any part thereof which fell within the legend of the map marked as 'M' which was within the said Lot 22. The first and second defendants' applied under O 18 r 19(1)(b)/(d) and O 92 r 4 of the Rules of Court 2012 for the action to be struck out or dismissed. The defendants also sought an order that the plaintiffs and their privies including Messrs Baru Bian Advocates ('the advocates') be restrained from commencing any further action against the first and second defendants. The first and second defendants claimed that the action was scandalous, frivolous or vexatious; or it was otherwise an abuse of the process of the court. The first and second defendants contended that: (a) the present action was totally misconceived and not maintainable as the matters raised by the plaintiffs were res judicata; (b) the rights or liabilities of the parties had been finally determined and adjudicated in previous representative actions with the respective claimants suing for and on behalf of themselves and all other claimants of native customary rights over the said Lots 20, 21 and 22; (c) all those areas indicated on the said Map 'M' were already adjudicated with orders or judgments delivered in the previous related cases; (d) the action was misconceived and not maintainable on the grounds of res judicata, issue estoppel and that the court was functus officio; (e) the plaintiffs and the advocates who were acting for them were disrespectful or disobedient to the orders of the court and were guilty of contempt of court; and (f) the action was statute barred by virtue of s 3 of the Sarawak Limitation Ordinance ('the SLO') whereby the plaintiffs failed to commence the action within the limitation period pursuant to Item 29 (three years for trespass) or Item 97 (six years of possession of land) of the Schedule to the SLO. The first and second defendants had become the registered proprietors of Lots 20 and 21 respectively since 27 June 2002 and they developed and cultivated Lots 20 and 21 respectively for their oil palm plantations since 2004. The first and second defendants thus contended that the cause of action, if any, against them had accrued since 27 June 2002 and was now time barred as the limitation period provided for under Item 97 of the Schedule of the SLO was six years, which ended on 26 June 2008. The claim was instituted on 17 March 2016.

Held, allowing the application to strike out with costs:

(1) The doctrine of res judicata applied to the present case. As the courts in Suit No 22–93 of 2001-III-I, No 22–2 of 2005, No 22–22 of 2005 and Originating Summons No 24–67 of 2005 ('the previous suits') had pronounced their judgments over the same area and in respect of the

same subject claimed by the plaintiffs, the plaintiffs' claim was now res judicata or issue estoppel applied (see para 26).

(2) The plaintiffs herein were not allowed to relitigate matters which had already been adjudicated by competent courts of law in the previous suits simply by modifying their native customary rights' claims from 'pemakai menua' to 'temuda'. The plaintiffs were bound by the decisions in the previous suits and the finality of those decisions should not be interfered by the present action (see para 27).

(3) Since there was no fraud pleaded or alleged, the exceptions in s 132 of the SLC did not apply here and it was not alleged or pleaded, the general rule on the indefeasibility of title under s 131 of the SLC applied. Thus the first and second defendants had the indefeasible titles of the said Lots 20 and 21, free of any alleged native customary rights or adverse *temuda* claim of the plaintiffs. The titles of the registered proprietors of the said Lots 20 and 21 was not subjected to collateral attack. Once the interests of the first and second defendants as registered proprietors were registered in the land register, the court had no power in the absence of fraud to remove or even order the removal of their respective names as registered proprietors (see paras 37 & 40).

(4) There was no credible evidence produced to show that the advocates deliberately instigated NCR claimants to make claims. It would be wholly wrong to restrict the advocates from bringing any further action against the first and second defendants in the future (see para 45).

(5) The action was statute barred by virtue of Item 97 of the Schedule to the SLO. If the plaintiffs had any right which they claimed was infringed by the alienation of Lots 20 and 21, the accrual of the cause of action would be upon the date of alienation on 27 June 2002. The alienation of Lots 20 and 21 was on 27 June 2002. The plaintiffs' claim was statute barred by 26 June 2008 which was six years after the alienation on 27 June 2002. The present action which was commenced on 17 March 2016 was thus obviously unsustainable by reason of limitation (see paras 49 & 51).

(6) In the light of the findings that the plaintiffs' claim was res judicata, statute barred and the first and second defendants' land titles in respect of Lots 20 and 21 enjoyed indefeasibility of title, the plaintiffs' claim against the first and second defendants on the face of it was, 'obviously unsustainable as it was scandalous, frivolous or vexatious or it was otherwise an abuse of the process of the court (see para 53).

[Bahasa Malaysia summary

Defendan pertama dan kedua masing-masing merupakan pemilik berdaftar dua bidang tanah dikenali sebagai Lot 20 dan Lot 21. BBC Estate VII Sdn Bhd, merupakan pemilik berdaftar sebidang tanah dikenali sebagai Lot 22. Kesemua

Lot 20, 21 dan 22 merupakan tanah zon campuran. Defendan pertama dan kedua merupakan pembeli suci hati dengan nilai bagi Lot 20 dan 21. Pihak plaintif menuntut kawasan di bawah Lot 20 dan Lot 21. Kedua-dua lot ini ialah kawasan yang sama yang bertindih dengan kawasan yang dahulunya dituntut oleh penuntut lain dalam pewakilan tindakan dalam Saman Bintulu No 22–2 Tahun 2005 yang penghakimannya telah diberikan oleh Mahkamah Tinggi Bintulu pada 4 April 2011. Kawasan yang terletak di Lot 20 dan Lot 21 yang dituntut oleh plaintif juga berada dalam kawasan yang menjadi hal perkara yang sama dalam saman di Mahkamah Tinggi Kuching Saman No 22–93 Tahun 2001-III-I, yang penghakimannya telah diberikan pada 21 Januari 2010. Kawasan yang dituntut oleh plaintif juga berada dalam kawasan dan hal perkara yang sama yang dituntut di Mahkamah Tinggi Bintulu Saman No 22–22 Tahun 2005 yang tindakan itu telah dibatalkan pada 18 Disember 2006. Pihak plaintif telah diperintahkan oleh Mahkamah Tinggi dalam Saman Pemula No 24–67 Tahun 2005 untuk diusir dan mengosongkan kedua-dua lot tersebut dan dihalang melalui suatu injunksi daripada menduduki atau memasuki atau memasuki semula ke mana-mana bahagian lot tersebut yang termasuk dalam petunjuk dalam peta yang ditanda 'M' yang termasuk dalam Lot 22 tersebut. Defendan pertama dan kedua memohon di bawah A 18 k 19(1)(b)/(d) dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012 untuk tindakan itu dibatalkan atau ditolak. Pihak defendan juga memohon suatu perintah supaya plaintif dan juga orang yang mengambil bahagian termasuk Tetuan Baru Bian Peguamcara ('peguamcara') dihalang daripada meneruskan apa-apa tindakan selanjutnya terhadap defendan pertama dan kedua. Defendan pertama dan kedua menyatakan bahawa tindakan itu merupakan suatu tindakan yang mengaibkan, remeh atau menyusahkan; atau merupakan suatu penyalahgunaan proses mahkamah. Defendan pertama dan kedua menyatakan bahawa: (a) tindakan ini merupakan suatu tindakan yang tersalah tanggap dan tidak boleh ditanggung kerana perkara yang dibangkitkan oleh plaintif telah menjadi res judicata; (b) hak dan tanggungan kesemua pihak telahpun ditentukan dan diputuskan dalam tindakan pewakilan yang terdahulu dengan penuntut yang berkenaan menyaman bagi dan bagi pihak mereka sendiri dan kesemua penuntut yang lain berkenaan dengan hak anak negeri ke atas Lot 20, 21 dan 22; (c) kesemua kawasan yang ditandakan di atas peta 'M' tersebut telahpun dihakimi apabila perintah atau penghakiman telah diserahkan dalam kes-kes terdahulu yang berkaitan; (d) tindakan itu merupakan suatu tindakan yang tersalah tanggap dan tidak boleh ditanggung atas alasan res judicata, estopel dan mahkamah telahpun menjadi functus officio; (e) pihak plaintif dan peguamcara yang mewakili mereka telah berlaku biadap atau tidak menghormati perintah mahkamah dan bersalah kerana menghina mahkamah; dan (f) tindakan ini telah dihalang oleh statut menurut kuasa s 3 Ordinan Had Masa Sarawak ('OHMS') kerana plaintif gagal untuk memulakan tindakan dalam tempoh had masa yang ditetapkan menurut Butiran 29 (tiga tahun bagi pencerobohan) atau Butiran 97 (enam tahun milikan tanah) Jadual kepada OHMS. Defendan pertama dan kedua telah

menjadi pemilik berdaftar bagi Lot 20 dan 21 masing-masing bagi perladangan kelapa sawit sejak tahun 2004. Defendan pertama dan kedua menghujahkan bahawa kausa tindakan ini, jika ada, terhadap mereka telah bermula sejak 27 Jun 2002 dan sekarang telah dihalang oleh had masa kerana tempoh had masa yang diperuntukkan di bawah Butiran 97 Jadual kepada OHMS ialah enam tahun, yang berakhir pada 26 Jun 2008. Tuntutan telah dimulakan pada 17 Mac 2016.

Diputuskan, membenarkan permohonan untuk membatalkan dengan kos:

(1) Doktrin res judicata terpakai dalam kes ini. Oleh kerana mahkamah dalam Saman No 22–93 Tahun 2001-III-I, No 22–2 Tahun 2005, No 22–22 Tahun 2005 dan Saman Pemula No 24–67 Tahun 2005 (secara kolektif dirujuk sebagi 'saman yang terdahulu') telah mengumumkan penghakiman mereka tentang kawasan yang sama dan berkenaan dengan hal perkara yang sama yang dituntut oleh plaintif, oleh itu tuntutan plaintif telah menjadi res judicata atau isu estopel terpakai (lihat perenggan 26).

(2) Pihak plaintif dalam kes ini tidak boleh untuk membuat litigasi semula perkara yang telah dihakimi oleh mahkamah undang-undang yang kompeten dalam saman yang terdahulu dengan menukar tuntutan hak adat anak negeri daripada 'pemakai menua' kepada 'temuda'. Pihak plaintif terikat dengan keputusan dalam saman yang terdahulu dan kemuktamadan keputusan itu tidak boleh diganggu oleh tindakan ini (lihat perenggan 27).

(3) Memandangkan tidak terdapat fraud yang diplid atau dikatakan, pengecualian di bawah s 132 KTS tidak terpakai dalam perkara ini dan ia tidak dikatakan atau diplid, maka kaedah am tentang kaedah hak milik tidak boleh sangkal di bawah s 131 KTS terpakai. Oleh itu, defendan pertama dan kedua mempunyai hak milik tidak boleh sangkal ke atas Lot 20 dan 21, bebas daripada apa-apa hak adat anak negeri atau bertentangan dengan tuntutan temuda oleh plaintif. Hak milik pemilik berdaftar bagi Lot 20 dan 21 itu tidak tertakluk kepada serangan kolateral. Sebaik sahaja kepentingan defendan pertama dan kedua sebagai pemilik berdaftar telah didaftarkan di buku daftar tanah, mahkamah tidak mempunyai kuasa untuk menghapuskan atau untuk memerintahkan penghapusan nama mereka sebagai pemilik berdaftar, dalam ketiadaan fraud (lihat perenggan 37 & 40).

(4) Tidak terdapat keterangan boleh percaya yang dikemukakan untuk menunjukkan bahawa pihak peguamcara dengan sengaja memulakan tuntutan NCR untuk membuat tuntutan. Adalah menjadi suatu kesalahan untuk menghalang peguamcara untuk membawa apa-apa tindakan selanjutnya terhadap defendan pertama dan kedua pada masa akan datang (lihat perenggan 45).

(5) Tindakan ini telah dihalang melalui statut menurut kuasa Butiran 97 Jadual kepada KTS. Jika plaintif mempunyai apa-apa hak yang menurut mereka telah dilanggar melalui pemberimilikan Lot 20 dan 21, permulaan kausa tindakan mereka ialah pada tarikh pemberimilikan itu iaitu pada 27 Jun 2002. Pemberimilikan Lot 20 dan 21 adalah pada 27 Jun 2002. Tuntutan plaintif telah dihalang melalui statut pada 26 Jun 2008 iaitu enam tahun selepas pemberimilikan pada 27 Jun 2002. Tindakan ini yang dimulakan pada 17 Mac 2016 adalah jelas tidak dapat dipertahankan atas sebab had masa (lihat perenggan 49 & 51).

(6) Dengan dapatan bahawa tuntutan plaintif telah menjadi res judicata, terhalang oleh statut dan hak milik tanah defendan pertama dan kedua berkenaan dengan Lot 20 dan 21 merupakan hak milik tidak boleh sangkal, tuntutan plaintif terhadap defendan pertama dan kedua pada dasarnya, adalah jelas tidak dapat dipertahankan kerana ia mengaibkan, remeh atau menyusahkan atau merupakan suatu penyalahgunaan proses mahkamah (lihat perenggan 53).]

Notes

For cases on indefeasibility of title and interests in general, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3725–3902.

For cases on issue estoppel, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7931–7957.

For cases on limitation in general, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 6008–6062.

For cases on solicitors in general, see 9 *Mallal's Digest* (5th Ed, 2015) paras 2169–2191.

Cases referred to

Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 4 MLJ 204, CA (refd)

Appoo s/o Krishnan v Ellamah d/o Ramasamy [1974] 2 MLJ 201 (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, FC (folld)

Awang Osen bin Awang Mat v Norhazlena bte Abdurani & Ors [2004] 7 CLJ 1, HC (refd)

Balare Jabu & 4 Ors v Merawa Sdn Bhd & Ors [2011] MLJU 1524; [2011] 4 CLJ 751, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Buang bin Mohamad v Awang Jimat bin Awang Nook & Ors [1999] 3 MLJ 239, HC (refd)

Greenhalgh v Mallard [1947] 2 All ER 255, CA (refd)

Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan,

deceased) v Superintendent of Lands and Surveys & Anor [2014] 6 MLJ 766; [2014] 9 CLJ 733, FC (refd)
John Denis De Silva v Crescent Court Management Corp [2006] 3 MLJ 631; [2006] 2 CLJ 605, HC (refd)
Joseph bin Paulus Lantip & Ors v Unilever PLC [2012] MLJU 1759; [2012] 7 CLJ 693, FC (refd)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119; [1993] 4 CLJ 332, SC (refd)
Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 MLJ 794, CA (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)
Nikodemus Anak Singgai v Sibu Slipway Sdn Bhd [2015] MLJU 646, HC (refd)
Nor ak Nyawai & Ors (suing for and on behalf of themselves and all other occupiers, holders and claimants of native customary right land (NCR) at Sungai Sekabai, Sungai Tajem, Tatau, Bintulu, Sarawak) v Tatau Land Sdn Bhd & Ors [2012] 6 MLJ 830; [2012] 8 CLJ 956, HC (refd)
Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44, PC (folld)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 3 CLJ 1, FC (refd)
TR Madel Anak Kandou & Ors v BBC Estate v Sdn Bhd & Ors [2011] MLJU 520, HC (refd)
Tasja Sdn Bhd v Golden Approach Sdn Bhd [2011] MLJU 067; [2011] 3 CLJ 751, FC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19(1), (1)(b), (1)(d), O 92 r 4
Land Code (Cap 81) ss 131, 132, 132(1)
Limitation Ordinance (Cap 49) s 3, Schedule, Items 29, 97

Joshua Baru (Baru Bian & Co Advocates) for the plaintiffs.
Henry Ling (Ling & Wong) for the first and second defendants.

Lee Heng Cheong J:

INTRODUCTION

[1] This is the first and second defendants' notice of application under O 18 r 19(1)(b)/(d) and O 92 r 4 of the Rules of Court 2012 for the following orders:

(a) that the action herein against the first and second defendants be struck out or dismissed pursuant to and O 92 r 4 of the Rules of Court 2012;

(b) that the plaintiffs and their privies including Baru Bian Advocates be restrained to commence any further action against the first and second defendants;

(c) costs; and

(d) further or such other orders as this honourable court deems fit.

[2] The grounds of this application are set out below and those stated in the affidavit in support of encl 16 as follows:

(a) the areas claimed by the plaintiffs under the land titles described as Lot 20 and Lot 21 both of Block 34 Kemena Land District ('the said Lot 20' and 'the said Lot 21') are over the same areas overlapping with the areas which were previously claimed by other claimants in representative actions in Bintulu Suit No 22–2 of 2005 (BTU) by TR Madel ak Kandou, Badar ak Bujang, Ernest Dana Diam, Erai ak Lai and Barendak ak Sap who represented themselves and 79 other family units/bilik of Rumah of Rumah Madel, Jalan Bintulu-Miri, 97000 Bintulu, Sarawak in the High Court at Bintulu against the first and second defendants together with BBC Estate VII Sdn Bhd (Company No 573537-U) of which the judgment has been delivered by the High Court at Bintulu on 4 April 2011;

(b) the entire areas comprised in the land titles of the said Lot 20 and Lot 21, claimed by the plaintiffs in the present action are entirely within the area and of the same subject matter instituted by Agi ak Bungkong & Ors against Ladang Sawit Bintulu Sdn Bhd & Ors in representative action in the High Court at Kuching in Suit No 22–93–2001-III-I, of which the judgment has been delivered on 21 January 2010 and the appeal against that decision was delivered by the Court of Appeal on 21 October 2011;

(c) the area claimed by the plaintiffs in the present action are also entirely within the area and of the same subject claimed by Banyang ak Ramai & Ors in representative action in the High Court at Bintulu in Suit No 22–22 of 2005 (BTU), which the action has been struck out with costs on 18 December 2006, and the appeal against that decision by them was dismissed on 16 October 2009;

(d) the plaintiffs including all other persons in the present action have been ordered by the High Court at Bintulu in Originating Summons No 24–67 of 2005 (BTU), inter alia, to be evicted and vacated forthwith and restrained by an injunction from occupying or entering and re-entering upon, remaining, erecting and occupying structures and carrying out any activity on that area any part thereof which fell within the legend of the map marked as 'M' annexed to the statement of claim is also within the said Lot 22 Block 34 Kemena Land District;

(e) the action herein is misconceived and not maintainable as it is res judicata, issue estoppel and the court is functus officio;

(f) the action herein by the plaintiffs and Messrs Baru Bian Advocates who are acting for them is disrespectful or disobedient to the orders of the court and are guilty of contempt of court;

(g) the action herein is statute barred by virtue of s 3 of the Sarawak Limitation Ordinance whereby the plaintiffs have failed to commence the action herein within the limitation period pursuant to Item 29 (three years for trespass) or Item 97 (six years of possession of land) of the Schedule to the Sarawak Limitation Ordinance; and

(h) the action herein is scandalous, frivolous or vexatious; or it is otherwise an abuse of the process of the court.

[3] The notice of application (encl 16) is supported by four affidavits namely:

(a) affidavit in support affirmed by Christopher Yek Nae Tsuey (encl 17);

(b) affidavit in reply No 1 affirmed by Christopher Yek Nae Tsuey (encl 23);

(c) affidavit in reply No 2 affirmed by TR Madel ak Kandou (encl 24); and

(d) affidavit in reply No 3 affirmed by Erai ak Lai (encl 25).

[4] The defendants' application herein is opposed by the plaintiffs with one affidavit in opposition affirmed by Siah ak Laga on the 29 June 2016 (encl 20).

THE PLAINTIFFS' CONTENTIONS

[5] The defendants contended that the present case is a special case and in the interest of justice, the doctrine of res judicata ought not to be applied as there is an exception to the doctrine of res judicata on the following grounds:

(a) the finding of the court relating to res judicata in Suit No 22–2 of 2005 (BTU), *TR Madel Anak Kandou & Ors v BBC Estate v Sdn Bhd & Ors* [2011] MLJU 520 ('*TR Madel*'s case') was made due to the technical procedure, ie not filing an affidavit in opposition, rather than on the full merits of the case;

(b) the actual extent of the NCR over the provisional lease were never determined in the said Suit No 22–93 of 2001-III, *Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 4 MLJ 204 ('*Agi Bungkong*'s case'); and

(c) that in fact in *Agi Bungkong*'s case, even though the Court of Appeal overturned the High Court decision on the absence of the map, the

court agreed that there was evidence of NCR at para 24 of the reported judgment. The Court of Appeal were only unsatisfied as to whether the NCR land had in fact overlapped with the provisional lease.

[6] The plaintiffs contended that there are exceptions to the doctrine of res judicata and in this present suit, the circumstances stated above warranted the exceptions.

[7] As regards the restraining order, the plaintiffs contended that learned counsel for the defendants made baseless allegations insinuating that Messrs Baru Bian Advocates deliberately instigate NCR claimants to make claims when there is no evidence to do so and that this court ought not to entertain such a contention.

[8] The plaintiffs also contended that this court cannot restrict Messrs Baru Bian Advocates from bringing any further action against the defendants in the future. This is a contravention to certain substantial rights guaranteed under the Constitution in the event there is genuine claim against the defendants in the future.

[9] On the issue of time limitation, the plaintiffs contended that the plaintiffs are seeking declaratory orders and that such orders are not circumvented by time limitation and relied on the case of *Balare Jabu & 4 Ors v Merawa Sdn Bhd & Ors* [2011] MLJU 1524; [2011] 4 CLJ 751 where His Lordship Abdul Wahab Patail JCA in delivering the judgment had this to say:

> [10] *While limitation appears to be a complete answer to a suit, action or proceeding for remedy, it is no answer to a suit, action or proceeding for declaratory orders*. A declaration whether the issuance of a licence is subject to native customary rights and whether the second and third respondents were in breach of a fiduciary duty pertaining to constitutional rights of the appellants, to know whether they have been wronged or not, is not purely academic. Even if it is without orders for compensation or damages, it serves the purpose of providing some solace to the appellants. And they have only their trust to rely upon that the government is committed to and will do what is right ... (Emphasis added.)

[10] The plaintiffs also contended that they are praying for a declaration of trespass in that the existing provisional lease and activities of the first and second defendants over the plaintiffs' NCR land if proven, constituted trespass over the land. Every continuance of trespass constitutes a fresh trespass where a new cause of action arises as long as the trespass continues As such, the plaintiffs' claim is still within time.

[11] The plaintiffs further contended that there are close connection between the plaintiffs in this present suit with the plaintiffs in *TR Madel*'s case

and *Agi Bungkong*'s case. The findings of evidence of NCR by the Court of Appeal in *Agi Bungkong*'s case showed that this matter is not frivolous or vexatious and that the plaintiffs' claim herein can be substantiated.

CONSIDERATION OF THE NOTICE OF APPLICATION (ENCL 16)

Undisputed facts

[12] The first defendant is the registered proprietor of that parcel of land situated at Jalan Bintulu/Sebuah, containing an area of 847 hectares, more or less and described as Lot 20 Block 34 Kemena Land District ('the said Lot 20').

[13] The second defendant is the registered proprietor of that parcel of land situated at Jalan Bintulu/Sebuah, containing an area of 937 hectares, more or less and described as Lot 21 Block 34 Kemena Land District ('the said Lot 21').

[14] Another company BBC Estate VII Sdn Bhd is the registered proprietor of that parcel of land situated at Jalan Bintulu/Sebuah, containing an area of 871 hectares, more or less and described as Lot 22 Block 34 Kemena Land District.

[15] All the said Lots 20, 21 and 22 are mixed zone lands. The first and second defendants are bona fide purchaser for valuable consideration of the said Lots 20 and 21.

[16] The first and second defendants contended as follows:

(a) that the present action herein is totally misconceived and not maintainable as the matters raised by the plaintiffs are *res judicata*;

(b) the rights or liabilities of the parties have been finally determined and adjudicated in previous *representative actions* with the respective claimants suing for and on behalf of themselves and all other claimants of native customary rights over the said Lots 20, 21 and 22; and

(c) that all those areas indicated on the said Map 'M' annexed to the statement of claim were already adjudicated with orders or judgments delivered in the following cases:

(i) Suit No 22–2 of 2005 (BTU);

(ii) Suit No 22–22 of 2005 (BTU);

(iii) Suit No 22–93 of 2001-III-I (KCH); and

(iv) Originating Summons No 24–67 of 2005 (BTU). ('the previous related cases')

THE PREVIOUS RELATED CASES

Suit No 22–2 of 2005 (BTU)

[17] As for the said Suit No 22–2 of 2005 (BTU), all the areas claimed by the plaintiffs as delineated in the said Map 'M' fall entirely within the same area under the said Lots 20 and 21 and part of the said Lot 22 were of the same subject matter in *representative action* in the High Court at Bintulu instituted by Tr Madel ak Kandou, Badar ak Bujang, Ernest Dana Diam, Erai ak Lai and Barendak ak Sap who sued for themselves and 79 other family units or *bilik* of *rumah* of Rumah Madel, Jalan Bintulu-Miri, 97000 Bintulu, Sarawak. See 'A13', locality of the said Lots 20, 21 and 22 with the superimposed Google satellite map on the areas claimed by the plaintiffs in the said map 'M' showing the overlapping areas claimed by the plaintiffs.

[18] It is pertinent to note that all the plaintiffs in the present case are residing at the same longhouse, Rumah Madel as in the said Suit No 22–2 of 2005 (BTU). Tr Madel ak Kandou, one of the plaintiffs in the said Suit No 22–2 of 2005 (BTU) in his affidavit evidence (see encl 24) in that suit, affirmatively stated as follows:

> 4. In Suit No.22-2-2005 (BTU), I, TR MADEL ANAK KANDOU (WN.KP.321006-13-5115) together with BADAR ANAK BUJANG (WN.KP.510607-13-5455), ERNEST DANA DIAM (WN.KP.50032013-5061), ERAI ANAK LAI (WN.KP.630505-13-5477) and BARENDAK ANAK SAP (WN.KP.410510-13-5135) had lawfully represented ourselves and also members of the 79 other family units or *bilik* of the Rumah Madel, Jalan Bintulu-Miri, 97000 Bintulu, suing BBC Estate V Sdn Bhd, BBC Estate VI Sdn Bhd and BBC Estate VII Sdn Bhd over the three parcels of land Lots 20, 21 and 22 which have been registered under their names as registered proprietors.
>
> 5. All and every one of us in the said Suit No.22-2-2005 (BTU) were represented by Messrs Baru Bian Advocates. The action taken by us in that Suit was solely based on the good advices given and the professional strategies taken by Mr Baru Bian of Messrs Baru Bian Advocates.
>
> 6. In the said Suit No. 22-2-2005 (BTU), MR ERAI ANAK LAI was one of the key persons who compiled the name list of all the household leaders of each and every family unit or bilik from my longhouse Rumah Madel and then collected moneys from them or their contributions to pay our legal fees to Messrs Baru Bian Advocates.
>
> 7. From the names of the Plaintiffs in this present case, I know all and each of them personally. All of them are residing at my longhouse, Rumah Madel. Surprisingly my son AMIN ANAK MADIL who is living and residing with me at my longhouse is also one of the Plaintiffs in this case.
>
> 8. In No.22-2-2005 (BTU), my action there had also represented all the Plaintiffs herein including my Son AMIN ANAK MADIL, and KARONG ANAK LIBAU

(F), SIAH ANAK LAGA (F), GARUDA ANAK SABANG (F), PUYANG ANAK SULAU (F), TADONG ANAK IGAI and SEKA ANAK AWANG and their family members who claimed to have native customary rights over all the areas claimed by them or against BBC companies in respect of the said Lots 20, 21 and 22 BLOCK 34 KEMENA LAND DISTRICT.

[19] Erai ak Lai, one of the plaintiffs in the said Suit No 22–2 of 2005 (BTU), affirmed in his affidavit (encl 25) that the claimants there had indeed represented all the people in that action including the plaintiffs in the present action. He made the following statements under oaths:

4. In Suit No.22-2-2005 (BTU), TR MADEL ANAK KANDOU 9 (WN.KP.321006-13-5115) together with BADAR ANAK BUJANG (WN.KP.510607-13-5455), ERNEST DANA DIAM (WN.KP.500320-1311-5061), BARENDAK ANAK SAP (WN.KP.410510-13-5135) and I had taken active roles in that case suing BBC Estate V Sdn Bhd (Company 13 No.573527-P), BBC Estate VI Sdn Bhd (Company No.573531-M) and BBC Estate VII Sdn Bhd (Company No.573537-U) over the three parcels of land Lots 20, 21 and 22 which have been registered under 16 their names as registered proprietors.

5. In Suit No.22-2-2005 (BTU), all of us had lawfully represented 18 ourselves and also 79 other family units or *bilik* of the Rumah Madel, 19 Jalan Bintulu-Miri, Bintulu, Sarawak.

6. In Suit No.22-2-2005 (BTU), Messrs Baru Bian Advocates had 21 represented all and every one of us named in that action as well as 22 members of all the 79 other family units or *bilik* of the Rumah Madel, 23 Jalan Bintulu-Miri, Bintulu, Sarawak. For the purpose of that action, I 24 compiled the name list of all the household leaders of each and every 25 family unit or bilik from my longhouse Rumah Madel and then 26 collected moneys from them or their contributions to pay our legal 27 fees to Messrs Baru Bian Advocates. I produce the name list with the 28 names of each family or household leaders who agreed to pay legal 29 fees showing their names and signatures consenting to the representative action in the said Suit No.22-2-2005 (BTU), and annex hereto mark as 'E1'.

7. In Suit No.22-2-2005 (BTU), after I collected the moneys or contributions of legal fees as stated in the said name list, I had handed over the said name list together with legal fees to Mr Baru Bian of Messrs Baru Bian Advocates sometime after he advised us that we had a very good case. In fact, in that Suit we solely listened to him and followed his good advices and strategies to bring action against the said BBC companies over the three parcels of land Lots 20, 21 and 22 which have been registered under their names as registered proprietors.

8. Looking at the names of the Plaintiffs in this present case, KARONG ANAK LIBAU (F), AMIN ANAK MADIL, SIAH ANAK LAGA (F), GARUDA ANAK SABANG (F), PUYANG ANAK SULAU (F), TADONG ANAK IGAI and SEKA ANAK AWANG, I know all and each of them personally as they are living at the same place, Rumah Madel. To the best of my knowledge, all of the Plaintiffs in this

present case had been very supportive of the representative proceedings in the said Suit No.22-2-2005 (BTU). It was only unfortunate that we lost the case.

9. Looking at the said name list I produced and marked as Exhibit 'E1' that I prepared, my name is found at page 2, No.8. I can see and point out as follows:-

(i) the name of the 1st Plaintiff Karong Anak Libu (f) is found at page 5, No.37;

(ii) the name of the 2nd Plaintiff Amin Anak Madil is found at page 2, No.15;

(iii) the name of the 3rd Plaintiff Siah Anak Laga (f) is found at page 5, No.31; and

(iv) the name of the 7th Plaintiff Seka Anak Awang is found at page 2, No.13 in the said name list.

[20] This court finds that the above affidavits sworn or affirmed by the said TR Madel ak Kandou and Erai ak Lai (vide encls 24 and 25 respectively) are not challenged, disputed or contradicted. The plaintiffs did not file any affidavit to dispute or contradict this fact. As such, they are deemed to have accepted the fact so asserted. This is therefore treated as an admission of the fact so asserted (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609, per Gopal Sri Ram JCA, (as he then was) at p 286 (MLJ); p 614a–b (CLJ)).

Suit No 22–93 of 2001-III-I

[21] As for the said Suit No 22–93 of 2001-III-I, the areas identified in Map 'M' are also entirely within the areas and of the same subject instituted claimed by the said Agi ak Bungkong & Ors. They sued for themselves and on behalf of all other proprietors, occupiers and holders and claimants of native customary rights land for the longhouse communities of Selezu, Setulai and Sepadok of Sebauh District, Bintulu, Sarawak against Ladang Sawit Bintulu Sdn Bhd & Ors in a representative action in the High Court at Kuching in Suit No 22–93 of 2001-III-I.

Suit No 22–22 of 2005 (BTU)

[22] As for the said Suit No 22–22 of 2005, the entire areas claimed by the plaintiffs in the present action are also entirely within the same area and of the same subject claimed by the said Banyang ak Ramai & Ors in another *representative action* in the High Court at Bintulu vide Bintulu Suit No 22–22 of 2005 (BTU) where they acted for themselves and other residents of the longhouses of Rumah Banyang, Rumah Agam and Rumah Tumpa as occupiers holders and claimants of native customary land.

Originating Summons No 24–67 of 2005 (BTU)

[23] The High Court at Bintulu in the said Originating Summons No 24–67 of 2005 (BTU) has granted the orders ordering the plaintiffs herein including all other persons in the present action being 'And persons unknown or all other persons' to be evicted and vacated forthwith and restrained by injunction from occupying or entering and re-entering upon, remaining, erecting and occupying structures and carrying out any activity within the said Lot 22 or any part thereof.

WHETHER THE PLAINTIFFS' CLAIM HEREIN IS RES JUDICATA?

[24] In the light of the undisputed affidavits of the said encls 24 and 25 respectively, supported by the relevant cause papers and the judgments or orders of the court marked as exhibits as A4, A5, A6 and A7 respectively, this court finds that the doctrine of *res judicata* will apply to the present case. It is not open to the plaintiffs to modify their claim from 'pemakai menua' to 'temuda' or for the same issue to be litigated afresh differently or using different names as plaintiffs.

[25] This court took cognisance of the fact that there is an existence of previous judgment or order of a competent court over the same subject in dispute as a relevant fact to bar a fresh suit or trial. The plaintiffs herein are bound by the past rulings of the court under the doctrine of res judicata (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783; *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119; [1993] 4 CLJ 332; *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 3 CLJ 1; and *Joseph bin Paulus Lantip & Ors v Unilever PLC* [2012] MLJU 1759; [2012] 7 CLJ 693).

[26] As the courts in the said Suit Nos 22–93 of 2001-III-I, 22–2 of 2005 (BTU), 22–22 of 2005 (BTU) and Originating Summons No 24–67 of 2005 (BTU) had pronounced their judgments over the same area and in respect of the same subject claimed by the plaintiffs herein, this court thus finds that the plaintiffs' claim herein is now res judicata or issue estoppel applies.

[27] This court is in agreement with the first and second defendants' contention that the plaintiffs herein are not allowed to relitigate matters which have already been adjudicated by competent courts of law namely the High Court in Suit No 22–2 of 2005 (BTU), Suit No 22–22 of 2005 (BTU) and Originating Summons No 24–67 of 2005 (BTU), simply by modifying their native customary rights' claims from 'pemakai menua' to 'temuda'. The plaintiffs are therefore bound by the decisions of the High Court in Suit Nos

22–2 of 2005 (BTU), 22–22 of 2005 (BTU) and Originating Summons No 24–67 of 2005 (BTU). The finality in these decisions should not be interfered by this present action.

[28] This court is guided by the Federal Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783, where Peh Swee Chin FCJ held at p 197 (MLJ); p 791c–d (CLJ) as follows:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. *When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the re judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that, it is in the public interest that there should be finality in litigation* — interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa.* (Emphasis added.)

[29] Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd* at pp 197–198 (MLJ); pp 791c, 791f–g and 793g–h (CLJ), also explained the extent of the doctrine of res judicata as follows:

At p 197 (MLJ); p 791c (CLJ):

> When a matter between two parties has been adjudicated by a court of competent jurisdiction, *the parties and their privies* are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth'. 'When a matter between two parties has been adjudicated by a court of competent jurisdiction, *the parties and their privies* are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth'.

At p 198 (MLJ); pp 791f–g and 793g–h (CLJ):

The starting point ought to be the celebrated passage by Wigram VC, in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which is:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

It is further necessary at this stage to understand the import of the words in the said famous statement ie '... every point which properly belonged to the subject of litigation ...' which Somervell LJ explained in *Greenhalgh v Mallard* [1947]

2 All ER 255 at p 257 as follows:

> *... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.* (Emphasis added.)

[30] In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd*, the Federal Court held that the doctrine of res judicata is not confined to causes of action or issues which the court is actually asked to decide or has already decided. It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[31] In *Joseph bin Paulus Lantip & Ors v Unilever PLC* [2012] MLJU 1759; [2012] 7 CLJ 693, Arifin Zakaria CJ on the application of the res judicata explained at pp 707B–708B as follows:

> [30] Thus, for the doctrine of res judicata to apply, the same issue must have been raised and decided in an earlier proceeding or action in which the parties are represented. And for that reason, it is not open for the same issue to be litigated afresh between the same parties. This doctrine is based on the public policy that there must be finality and conclusiveness in judicial decisions and the right of the individual from being vexed by multiplicity of suits at the instance of an opponent. In *Satyadhyan Ghosal And Others vs Sm. Deorajin Debi And Another* 1960 AIR 941, the Indian Supreme Court stated the principle as follows:
>
> > (7) The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.
>
> [31] In *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313, Vigram VC expressed the view that:
>
> > The plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, *but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligent, might have brought forward at the time.*
>
> This statement came to be known as the rule in *Henderson v Henderson.*
>
> [32] In *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57;

[1997] 2 CLJ 104, Gopal Sri Ram JCA (later FCJ) observed that:

> *We cannot over emphasize the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly.*
>
> *The parties are bound by the rulings of the court under the principle of res judicata. It is also important to observe that a decision given by a court at one stage on a particular issue is binding on it at a later stage in the same or subsequent suit.* (Emphasis added.)

INDEFEASIBILITY OF TITLE

[32] The titles, rights and interests of the first and second defendants as the registered proprietors of the said Lots 20 and 21 respectively are indefeasible by virtue of the relevant provisions of the Sarawak Land Code (Cap 81).

[33] Section 131 of the Sarawak Land Code states as follows:

> 131 Title Guaranteed To Registered Proprietor
>
> No title or right to land included in the *Register* shall be acquired by possession or user adversely to, or in derogation of, the title of the registered proprietor holding directly from the Government.

[34] Section 132(1) of the Sarawak Land Code states as follows:

> 132(1) Indefeasibility Of Title
>
> ... the registered proprietor of any estate or interest in land to which this section applies shall*, except in the case of fraud*, hold such estate or interest subject to all the interests noted on the register but free from all other interest ...

[35] In *Awang Osen bin Awang Mat v Norhazlena bte Abdurani & Ors* [2004] 7 CLJ 1, Abdul Aziz Abdul Rahim JC, (as he then was), held at pp 8h–9a–b as follows:

> *At this juncture, it may be observed that* s 132(1) of the Sarawak Land Code *provides that the registered proprietor of any estate or interest in land to which the section applies, holds such estates or interest subject to the interest noted on the register, and he holds so free from all other interests. This is the doctrine of indefeasibility of title entrenched in s 132.*
>
> *Furthermore, s 134(2) of the Code gives a person indefeasible title once it is registered* (see *Kho Kwang Choon v Phuman Singh* [1968] 1 MLJ 183). A registered bona fide purchaser for value, and in the absence of fraud, may claim good title. In this regard it is pertinent to note that under s 133 *of the Code the doctrine of notice does not apply.* ... (Emphasis added.)

[36] His Lordship Abdul Aziz Abdul Rahim JC in *Awang Osen bin Awang Mat* case, at p 10a–c further held as follows:

> The law therefore is well settled: that the registration conferred on the registered proprietor an indefeasibility of title. In so far as it relates to the Sarawak Land Code it is manifested in s 132.

[37] Since there is no fraud pleaded or alleged in the present case, the exceptions in s 132 of the Sarawak Land Code do not apply here and it has not been alleged or pleaded, this court holds that the general rule on the indefeasibility of title under s 131 of Sarawak Land Code shall applies. Thus the first and second defendants herein have the indefeasible titles of the said Lots 20 and 21, free of any alleged native customary rights or adverse *temuda* claim of the plaintiffs. The titles of the registered proprietors of the said Lots 20 and 21 is not subjected to collateral attack like the instance case or any fresh ground of attack by the plaintiffs on the alleged native customary rights' claims.

[38] This court is also guided by the Privy Council case of *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44, where Lord Diplock held at p 45 as follows:

> *The title to land or to an interest in the land which is conferred by registration is indefeasible in the absence of fraudulent or similar misconduct on the part of the person in whose name the title or interest is registered;* but such misconduct does not defeat the registered title or interest of a bona fide purchaser for value from the guilty party or any person claiming through such a purchaser. (Emphasis added.)

[39] Further in *John Denis De Silva v Crescent Court Management Corp* [2006] 3 MLJ 631; [2006] 2 CLJ 605, Abdul Malik Ishak J (as he then was) held at p 648 (MLJ); pp 624E–625A–D (CLJ) as follows:

> The court in *Fels v Knowles* (1906) 26 NZLR 604 at p 620 aptly said that:
>
> > *The cardinal principle … is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world.*
>
> *Indefeasibility connotes conclusiveness that is given to an estate or interest directly upon registration. Upon registration it is said that the title becomes unimpeachable* (*Assets Co v Mere Roihi* [1905] AC 176) or unexaminable (*Creelman v Hudson Bay Insurance Co* [1920] AC 194) simply because the state guarantees the correctness of the particulars found in the title. The court in *Frazer v Walker* [1967] 1 All ER 649 at p 652 defines the word 'indefeasibility' in this unique way:
>
> > … it is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. The conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim

> whatsoever; ... there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.
>
> *The key word here is 'registration'. Upon registration, indefeasibility comes into play. Thus, indefeasibility is given upon registration to a statutory estate and it is also given to a registered interest like a charge. Strictly speaking, under the Torrens system, until an instrument is registered, it has no effect in creating an interest or estate in land. But once it is registered by the State, the title becomes a good title subject to certain statutory and overriding exceptions.* The court, in *Boyd v Mayor of Wellington* [1924] NZLR 1174 at p 1187, held the view that if 'a person gets a registered title he, not having been guilty of any fraud, his title is conclusive'. The court too, in *Schultz v Corwill Properties Pty Ltd* [1969] 90 WN (Pt 1) (NSW) 529 at p 535, held the view that the register 'establishes title'. (Emphasis added.)

[40] Once the interests of the first and second defendants as registered proprietors are registered in the land register, the court has no power in the absence of fraud to remove or even order the removal of their respective names as registered proprietors. In *Kho Kwang Choon v Phuman Singh* [1968] 1 MLJ 183, Williams J said at pp 184–185C–D:

> Having considered the legislation immediately pertinent to this case, namely the Land Code (Cap 81, of the Laws of Sarawak), I have come to the conclusion, and most certainly so in the absence of fraud, that *once an interest is registered the court has no power to remove or even order the removal of the name of a proprietor therefrom in the manner here prayed*; and here I would add that the plaintiff is a registered 'proprietor' of an interest in land. Sections 132 and 134 appear to make this quite clear. *Indeed, it may very well be that in so far as the Land Code of Sarawak is concerned the powers of the court are more restricted than those in New Zealand as there express powers are granted to the courts to interfere and order a rectification by the registrar in the case of fraud. No such direct powers are given under the Land Code and it may well be that the only course open to a person claiming a remedy against a registered proprietor is that provided for by s 136 of the Code, with an ultimate appeal to the court under s 203.* But as I have said the question of fraud does not arise here. (Emphasis added.)

[41] The case of *Kho Kwang Choon* applied by Hasan Lah JC (as he then was) in *Buang bin Mohamad v Awang Jimat bin Awang Nook & Ors* [1999] 3 MLJ 239, where His Lordship said (at p 255E–F) as follows:

> In this respect I agree with the learned counsel for the third and fourth defendants that the interest acquired by them can only be set aside on ground of fraud under ss 132 and 134 of the Land Code. In the present case there is no allegation of fraud against the third and fourth defendants by the plaintiff. In *Kho Kwang Choon v Phuman Singh* [1968] 1 MLJ 183, Williams J had this to say at pp 184I–185B: ...

A And at p 255, Letter I:

> ... I would still hold that the plaintiff is still not entitled to get judgment against the third and fourth defendants because illegality as distinct from fraud is not sufficient to defeat the third and fourth defendants' registered interest in the said land.

B

[42] The said case of *Kho Kwang Choon* was also applied in *Appoo s/o Krishnan v Ellamah d/o Ramasamy* [1974] 2 MLJ 201 where Mohamad Azmi J (as he then was) said, at p 204, LHC last two lines to RHC Letter A–B:

C

> The next main issue for determination is whether the deceased's title to the land is indefeasible. From decided cases quoted by learned counsel, it seems to be the law that illegality as distinct from fraud is not sufficient to defeat the deceased's title in the land. (See *Kho Kwang Choon v Phuman Singh* [1965] 2 MLJ 189b; [1968] 1 MLJ 183. ...

D

[43] In *Nikodemus Anak Singgai v Sibu Slipway Sdn Bhd* [2015] MLJU 646 (High Court in Sabah and Sarawak at Bintulu, Suit No 22–208 of 2007-I), similar question was posed and sought to be determined by the court ie whether the defendants' rights, title and interest as registered proprietor of land is indefeasible and free of the plaintiff's claim of alleged native customary rights. Rhodzariah Bujang JC (as she then was) held as follows:

E

> The indefeasibility of the leases and licence
>
> In my limited experience dealing with these type of cases, I have found that claimants of native customary rights have invariably sued the holders of forest licence or land titles together with the State Government and it's relevant agencies. It is so in this case. *The argument of the holders of the leases is that the title issued to them are indefeasible, quoting s 132 of the land Code with provides as follows:*
>
> ...

F

G

> ...
>
> Mr Baru Bian, for the plaintiffs, in his written submission have painstakingly taken me through the case authorities to show that the words 'Subject to this Code' means the leases granted to the second and third defendants are subject to his clients' native customary rights over the land. He said the document of title issued to the said defendants in this case were issued in contravention of the other provisions of the Land Code which give recognition to his clients native customary rights over the land because the Director of Lands & Surveys do not have the power to alienate native customary land. He cited ss 13, 15 and 28 of the Land Code. I would reproduce ss 13(1), 15(1) and 28(1) below being the relevant provisions which merits consideration.

H

I

> ...
>
> ...

I have no qualms in agreeing with him, that in view of the provisions he quoted, land titles should not be issued over native customary land, unless they have been extinguished first but with respect, *once the titles are issued, I take the contrary stand and the defendants are right-there is indefeasibility of title. There are ample case authorities which decided that recognition under the Land Code gives an indefeasible title under the Land Code.* Mr Sim Hui Chuang has highlighted to me the relevant part of *Halsbury's Law of Malaysia* Vol 10(1) 2008 Reissue at para (250.153) where the cases of *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 3 MLJ 163 and *Chew Siang Jin v Lau Chee Ching & Ors* [2000] MLJU 771 were cited in support of the indefeasibility proposition. *In my opinion, the limitation given by the words 'Subject to this Code' cannot mean subject to native customary rights because it would be downright absurd to give indefeasible title to one when making it subject to another person's same right to do as he pleases over the same piece of land-to put it in a more graphic term it is just like a dog chasing it's own tail-there would be no end in sight for either the native customary rights claimant, nor the title holder*. However, Mr Baru Bian is right in one aspect. Native customary rights land should not be alienated, period. That is clear from ss 130 and 15(1) of the Land Code but when it does, and *I came back to what I have also said earlier, the claimant of these native customary rights land has a legitimate complaint against the issuer of the land title and should take issue with them; not the title holder unless they can prove fraud as stipulated in s 132(1) of the Land Code.* (Emphasis added.)

RESTRAINING ORDER

[44] The first and second defendants contended that there is no dispute that Messrs Baru Bian Advocates have been acting for the claimants in the previous related cases and yet they are still acting for some of them in the present action. Thus Messrs Baru Bian is instrumental to the institution of the present action and that the present suit was instituted by the plaintiffs under the instigation or influence of Messrs Baru Bian Advocates. In the circumstances, Messrs Baru Bian Advocates is disrespectful or disobedient to the court. The first and second defendants thus sought a restraining order from this court.

[45] As regards the restraining order sought by the first and second defendants, this court finds that there is no credible evidence produced to show that Messrs Baru Bian Advocates deliberately instigate NCR claimants to make claims. It would be wholly wrong to restrict Messrs Baru Bian Advocates from bringing any further action against the first and second defendants in the future.

[46] This court wish to clarify that on the 19 October 2016 when this court delivered it's short ruling in respect of this notice of application (encl 16), this court inadvertently grants an order in terms of encl 16 when in fact this court intended to grant an order in terms of encl 16 except prayer 2 of the same.

A WHETHER THE PLAINTFFS' ACTION IS STATUTE BARRED

[47] It is also undisputed fact that the first and second defendants have become the registered proprietors of the said Lots 20 and 21 respectively since 27 June 2002 and they developed and cultivated both the said Lots 20 and 21 respectively for their oil palm plantations since 2004. The first and second defendants thus contended that the cause of action, if any, against of the first and second defendants respectively has accrued since 27 June 2002. It is now time barred as the limitation period provided for under Item 97 of the Schedule of the Sarawak Limitation Ordinance was six years, and then it ended on 26 June 2008. However, the claim herein was instituted on 17 March 2016, *which is* late by nearly six years after the first and second defendants had possession and carried out their oil palm plantations on the said Lots 20 and 21.

[48] This court finds that even if the plaintiff's claim is not res judicata, the present action herein is now statute barred by virtue of Item 97 of the Schedule to the Sarawak Limitation Ordinance:

97.	Suit for which no period of limitation is provided elsewhere in this Schedule	Six years	When the right to sue accrues.

[49] If the plaintiffs had any right which they claimed was infringed by the alienation of the said Lots 20 and 21, the accrual of the cause of action would be upon the date of alienation on 27 June 2002. It is an undisputed fact that the alienation of the said Lots 20 and 21 was on 27 June 2002. In *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor* [2014] 6 MLJ 766; [2014] 9 CLJ 733 the plaintiff claimed that their rights were infringed by the alienation of land. The Federal Court said, at para 4 on p 771 (MLJ); p 739 (CLJ):

> [4] It was the plaintiff's case that sometime in 1987 the Land was alienated by the defendants to Sarawak Economic Development Corporation ('SEDC') without extinguishment of the appellant's NCR over the Land and without payment of compensation in contravention of the provision of s 15 of the Land Code. ...

Then at para 26 at p 776 (MLJ); p 746 (CLJ), the Federal Court decided:

> [26] The basis of the plaintiff's complaint is that the deceased's NCR land had been amalgamated with other land, subdivided and then, the subdivided lots which included the deceased's NCR land alienated to SEDC. The plaintiff was right in contending that the alienation of the land to SEDC was unlawful as no compensation was paid by the government under s 15 of the Land Code wherein the deceased or his estate suffered loss and damage. We are of the view *upon alienation of the land* to SEDC *the rights of the deceased to the land had been extinguished or he had been deprived of the land and his right* to seek compensation

against the government under s 197 of the Land Code *accrued*. *His action however was barred by limitation as it was filed outside the period of limitation prescribed by s 202 of the Land Code. On this point we agree with the finding of the Court of Appeal that the plaintiff commenced his action in the High Court in April 1996,* some fifteen years *from 1981* (the year the deceased's application for the land was rejected) or alternatively nine years *from 1987 (the year the land was alienated to* SEDC without extinguishment of the NCR). *In either case the commencement of action by the plaintiff was time barred.* ... (Emphasis added.)

[50] So the Federal Court had decided that time started to run, at the latest, from the date of alienation of the land. In respect of the alienation, the deceased's rights in *Husli Mok* were extinguished upon the alienation. In either case the claim was found to be timed barred.

[51] As stated earlier, the alienation of said Lots 20 and 21 was on 27 June 2002. As the Federal Court has in *Husli Mok*'s case decided that time starts to run, at the latest, from the date of alienation of the land, therefore based on Item 97, the plaintiffs' claim was statute barred by 26 June 2008 which was six years after the alienation on 27 June 2002. The present action was commenced on 17 March 2016, thus the present action is obviously unsustainable by reason of limitation.

[52] It is noted that in the recent Court of Appeal case, Civil Appeal No Q-01–305–07 of 2012, *Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794, Raus Sharif PCA, delivering the judgment of the Court of Appeal said at paras 35–37:

[35] Insofar as the first defendant was concerned, as we have alluded to in the earlier part of this judgment the limitation period provided for under Item 97 of the SLO is six years. In this regard based on Item 97 of the SLO, we find that the plaintiffs' action which was instituted in year 2011 nearly eighteen years after the first defendant had finished the oil palm plantation is clearly out of time.

[36] In the same way, learned counsel for the first defendant also submitted that the plaintiffs' writ action filed against them in 2011 was barred by limitation by reasons as envisaged under Items 72, 110, 112 of the SLO. ...

[37] Premised on the above, learned counsel for the first Defendant submitted that the claim instituted by the plaintiffs is time barred under the aforesaid Items of the SLO. We have no hesitation in agreeing with the first Defendant's contention on this point. Clearly, even looking at the other Items under the SLO which is consonant with the issue of limitation and which is applicable to the instant case, we can safely conclude that the plaintiffs' action herein against the first defendant is also statute barred.

A THE COURT FINDINGS

[53] In the light of this court's findings that the plaintiffs' claim herein is res judicata, statute barred and the first and second defendants' land titles in respect of Lots 20 and 21 enjoyed indefeasibility of title, this court finds that the plaintiffs' claim against the first and second defendants on the face of it, *'obviously unsustainable* as it is scandalous, frivolous or vexatious or it is otherwise an abuse of the process of the court' (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7; *Tasja Sdn Bhd v Golden Approach Sdn Bhd* [2011] MLJU 067; [2011] 3 CLJ 751; and *Nor ak Nyawai & Ors (suing for and on behalf of themselves and all other occupiers, holders and claimants of native customary right land (NCR) at Sungai Sekabai, Sungai Tajem, Tatau, Bintulu, Sarawak) v Tatau Land Sdn Bhd & Ors* [2012] 6 MLJ 830; [2012] 8 CLJ 956).

[54] In the light of this court's above findings, this court finds that there are merits in encl 16. In the premises, this court thus grants an order in terms of encl 16 with costs.

Application to strike out allowed with costs.

Reported by Kanesh Sundrum